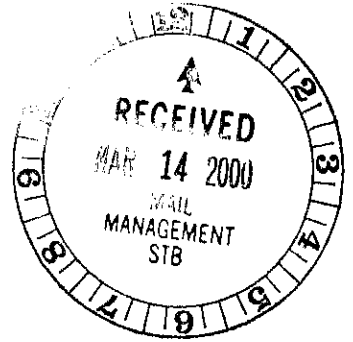


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BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 582

PUBLIC VIEWS ON MAJOR RAIL CONSOLIDATIONS

REPLY OF THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY
TO PETITION OF EDISON MISSION ENERGY COMPANY
AND MIDWEST GENERATION, LLC

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SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582

PUBLIC VIEWS ON MAJOR RAIL CONSOLIDATIONS

REPLY OF THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY
TO PETITION FOR A RULEMAKING PROCEEDING FILED BY
EDISON MISSION ENERGY COMPANY AND MIDWEST GENERATION, LLC

The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby replies to the petition of Edison Mission Energy Company and Midwest Generation, LLC ("Edison") requesting that the Surface Transportation Board adopt a new regulation that would "prohibit the filing of a merger application among two or more Class I railroads until at least 36 months have passed since the implementation of a previous merger of Class I railroads." Summary of Statement of Edison Mission Energy Company and Midwest Generation, LLC, STB Ex Parte No. 582, filed February 23, 2000.¹ Because other parties, including several of the Class I railroads that compete with BNSF, requested similar action in the course of the Ex Parte No. 582 proceedings, BNSF's reply to Edison's petition also responds to several of the comments made during the course of those public hearings.

BNSF respectfully requests that the Board deny Edison's petition and take no action that would prevent the timely consideration, on the merits, by the Board of the proposed

¹Edison's pleading included a petition for the Board to issue a rule and, therefore, is properly treated as a filing under Section 1110.2(b) of the Board's Rules of Practice. Accordingly, BNSF files this timely answer to Edison's pleading pursuant to Section 1104.13 of those Rules.

combination of BNSF and Canadian National Railway Company ("CN"). The terms of the Interstate Commerce Commission Termination Act ("ICCTA") and the interests of the public, shippers, BNSF, CN and the rail industry require that the Board adhere to its policy of careful consideration of specific combination proposals presented to it and deny Edison's petition, as well as reject similar calls in Ex Parte No. 582 from some sectors for a generic moratorium or any other form of delay in the consideration of further rail combinations.

The written statements and testimony in Ex Parte No. 582 clearly demonstrate that the proposed combination of BNSF and CN has significant support from many of the participating shippers and communities who would be most directly affected by the combination. These parties and shortline railroads presented statements on the concrete benefits that a timely-implemented BNSF/CN combination would bring. The record also documents that there is no consensus on the need for, or desirability of, a moratorium, with far fewer than half of all commenters during the hearing supporting this radical change in Board policy. The record further reveals that the U.S. Department of Transportation opposes a moratorium, while the financial community and prominent economists believe that a moratorium on mergers and combinations of Class I railroads would not be in the public interest, would itself constitute unwarranted re-regulation, would introduce new regulatory uncertainty, would harm competition in the railroad industry, and would reduce the ability of the railroad industry to attract the capital necessary to invest in infrastructure and improve service to customers.

BNSF recognizes that some shippers and communities — particularly those who were, and still are, adversely affected by the service disruptions occasioned by the Union

Pacific Railroad ("UP"), Norfolk Southern Corporation ("NS") and CSX Corporation ("CSX") transactions — are concerned about the impacts of any further rail combinations on the service they receive. Some of these shippers supported a moratorium. However, most of the shippers who commented on current service problems are customers of UP, NS or CSX, and they are understandably concerned with those carriers' service issues; they are not focused on BNSF service.

BNSF recommends that the STB establish new ground rules for evaluation of any future merger plans to ensure that the combining railroads do not currently have their own serious service problems and are not likely to have service problems after combining; that they have the financial strength to implement their plans and to continue investing in necessary infrastructure; and that they are not likely to cause operating problems for other railroads or produce other unacceptable downstream effects. BNSF expects to address these issues fully in its application and the associated proceedings.

BNSF intends to work hard to answer the concerns raised by our customers in Ex Parte No. 582. The concerns of our shippers about the adequacy of service offered by the combined BNSF/CN are best addressed through a specific review of our operating plan, the Service Integration Plan we are planning to provide voluntarily, and the individualized service guarantees BNSF will negotiate with its customers, an unprecedented action.

Indeed, Robert Krebs, BNSF's Chairman and CEO, has made specific suggestions on the standards of review that should be applied in merger cases to assure that service will improve and not suffer. In a March 10, 2000 press release, Mr. Krebs and Paul Tellier,

President and CEO of CN, have committed to file both a Service Integration Plan, addressing how the combined railroads “will provide service equal to or better than we are currently providing shippers,” and “a dispute-resolution process for shippers who are less than satisfied with our service,” as part of their application. Thus, BNSF is fully confident that, if reviewed on its merits, its proposed combination with CN will pass muster with the Board and the public.

However, it is essential to the health and stability of the rail industry that BNSF and CN be provided the opportunity to present their case on the merits. Adoption of a generic moratorium or other form of delay on consideration of further combinations of Class I railroads would be bad policy and bad law:

- A moratorium would inhibit the efforts of the railroad industry to improve service, improve efficiencies, and compete for new business.
- A moratorium would deny shippers the benefits that more efficient service, including expanded single-line hauls, can provide.
- A moratorium would reward railroads that have inflicted service problems on their customers by protecting those railroads from competition from well-run and efficient railroads.
- A moratorium would discourage capital investment in the infrastructure required for the future by introducing new regulatory delay and uncertainty and limiting the avenues available for railroads to improve their performance.
- A moratorium would result in permanent losses of potential shipper benefits, because siting, transportation and other business decisions by customers must continue to be made during the moratorium without knowing if BNSF/CN service will be available. Those decisions cannot be reversed.
- A moratorium presumes that the railroad industry and its shippers can be insulated from the changes in the dynamic economy in which they must all compete.

- A moratorium would add uncertainty for shareholders of railroad companies and would drive up the cost of capital for the entire industry.
- A moratorium could encourage hasty combinations in the future, because railroads would be driven to take advantage of the next window of opportunity, fearing that any actions by their competitors would result in the Board's closing the window yet again.
- A moratorium would violate the letter and spirit of the law under which the STB operates.

In charting its course, the STB must recognize that declining to decide the merits of the BNSF/CN proposal constitutes a decision to reject that proposal. The choice is, therefore, only between a fully informed decision and one made without knowing or considering the specifics of the BNSF/CN proposal.

I. There Is No Consensus in Favor of a Moratorium on Future Combinations.

The Ex Parte No. 582 proceedings elicited much discussion of the wisdom of a moratorium on further rail consolidations. However, despite statements to the contrary, no clear consensus emerged for imposition of a moratorium. In fact, many statements explicitly opposed the imposition of any moratorium. When the question was put directly to participants who had not addressed the issue in their written statements, many commenters expressly opposed any across-the-board moratorium, while others declined to take a position. Furthermore, many of the proponents of a moratorium were explicitly reacting to the unfortunate experiences of the UP/SP merger and the CSX/NS carve-up of Conrail, rather than any perceived harms arising directly from the proposed BNSF/CN combination. While a consensus could not justify otherwise bad law or policy, it is clear from a review of the actual comments that there is no consensus on this issue.

A wide variety of commenters opposed any blanket moratorium on railroad mergers. First, from the federal governmental perspective, Rodney Slater, Secretary of the U.S. Department of Transportation, clearly expressed the view “that we do not believe a moratorium on mergers is the right response.” Ex Parte No. 582: Public Views on Major Rail Consolidations, Transcript, March 7, 2000, at 35 (hereinafter “Transcript”).

Second, the financial community expressed concern about the regulatory uncertainties created by a moratorium. James J. Valentine, of Morgan Stanley & Co., stated that a moratorium, just as much as an extended proceeding to review a common control application, would create uncertainty adversely affecting railroad stocks, so that they “are probably going to be dead money.” Transcript, March 7, 2000, at 249. Robert S. Kaplan, of Goldman, Sachs and Co., stated that the market wants to see regulation “where mergers are evaluated on the basis [sic] as they come up on a case-by-case basis.” Transcript, March 7, 2000, at 279.

Third, an array of prominent economists clearly explained why a blanket moratorium would harm the industry:²

- Kenneth J. Arrow, the Joan Kenney Professor of Economics Emeritus at Stanford University and winner of the 1972 Nobel Memorial Prize in Economic Science, stated that “delays in the completion of efficient mergers resulting from preplanning would result in harm to consumers.” Statement of Kenneth J. Arrow, Ex Parte No. 582: Public Views on Major Rail Consolidations, at 4 (Feb. 29, 2000). He added that the preplanning process would offer little if any additional value “beyond that achieved through standard regulatory review of proposed mergers.” Ibid. He

²No economist explicitly supported a moratorium, although an economist sponsored by UP suggested changes in the substantive standards applied to the combination of Class I railroads. See Comments of David T. Scheffman, Ex Parte No. 582: Public Views on Major Rail Consolidations (Feb. 29, 2000).

rejected the argument that mergers by some railroads should wait until the service difficulties of other railroads are resolved. Id. at 9.

- Robert S. Hamada, Edward Eagle Brown Distinguished Service Professor of Finance at and Dean of the Graduate School of Business of the University of Chicago, stated that a moratorium would constitute a change in the “regulatory framework” that would increase uncertainty and very likely reduce the incentive to make investments. Transcript, March 9, 2000, at 277–279. A moratorium could be taken as a sign by the investment community that the STB is moving in a “re-regulatory” direction, and this would “dampen railroads’ incentives to make the investments needed to maintain and upgrade the railroad infrastructure.” Statement of Robert S. Hamada, Ex Parte No. 582: Public Views on Major Rail Consolidations, at 5 (Feb. 29, 2000).

- Robert W. Hahn, Director of the AEI-Brookings Joint Center for Regulatory Studies, stated that a moratorium would be bad public policy because regulators cannot determine when capital markets will find opportunities for efficiency gains and urged the Board to continue its use of case-specific proceedings. Statement of Robert W. Hahn, Ex Parte No. 582: Public Views on Major Rail Consolidations, at 10 (Feb. 29, 2000). Dr. Hahn concluded that a moratorium would have a chilling effect on investment and would probably reduce the rate of technological change in the rail industry. Transcript, March 9, 2000, at 290.

- Joseph P. Kalt, Ford Foundation Professor of International Political Economy at the John F. Kennedy School of Government, Inc., and Dr. Amy Bertin Candell, a senior economist at Lexecon Inc., stated that the Board should not delay considering proposed transactions and should not attempt to manage the structure and timing of rail consolidations. Statement of Joseph P. Kalt and Amy Bertin Candell, Ex Parte No. 582: Public Views on Major Rail Consolidations at 11 (Feb. 29, 2000).

Fourth, many BNSF and CN shippers welcome the promise of single-line service, improved efficiency and expanded markets the proposed combination would provide. These shippers oppose any moratorium, because it would delay or eliminate these benefits.

Those parties that did express support for a moratorium did not explain how a moratorium would solve the legitimate issues they raised or why these issues cannot be

addressed during the thorough consideration of individual control applications. Moreover, the parties could not agree on the duration of a moratorium. For example, John W. Snow, CEO of CSX, could not decide how long the protection of a moratorium should last. “And that could be three years. It could be five years. I wouldn’t put a time on it...” Transcript, March 7, 2000, at 215.

Most of the parties who supported a moratorium because of current service problems are experiencing those problems on the UP, CSX or NS systems, not on BNSF or CN. It is unfortunate that, in making their statements, UP, CSX and NS suggested to their shippers that their service problems may not be resolved by the mid-2001 target date for implementation of the BNSF/CN transaction — over five years after UP’s acquisition of SP and two years after CSX and NS divided the Conrail assets. The legitimate concerns of those UP, CSX and NS shippers could and should be addressed by the STB in oversight proceedings addressing those transactions. Those concerns do not, however, justify refusing to consider the potential benefits from consolidation of BNSF and CN, two carriers who have not generated widespread complaints from their shippers. Moreover, it is possible for the Board to examine whether the BNSF/CN combination would result in increasing the service difficulties of other railroads, and then to ensure that it will not.

Another group of shippers opposed any further combinations unless the Board reversed its well-justified policies on open access, differential pricing and similar issues. These shippers are using the wrong forum to seek the wrong remedy. The combination of BNSF/CN would not, under clear Board policy, result in the elimination of competitive options for those shippers who currently have service from BNSF and CN and no other

carrier. In those few cases where competitive issues would be raised, Board policy will result in the adoption of appropriate remedies. What is more, imposing a moratorium would not solve any of their problems.

Yet another group of shippers expressed concern about the future pairings of the western and eastern U.S. railroads into a national “duopoly.” Of course, the combination of BNSF and CN would not create such a “duopoly.” However, Secretary Slater set the appropriate tone — opposing any moratorium on mergers today, while acknowledging, as has Mr. Krebs, that the union of a major eastern U.S. carrier with a major western U.S. carrier will raise unique issues to be considered thoroughly at the time any such combination is proposed. Transcript, March 7, 2000, at 34–36.

Finally, UP, CSX, NS and CP responded immediately to the proposed BNSF/CN combination by issuing their own call for a moratorium. Their “concerns” are addressed in Section V of these comments.

In summary, there is no consensus demanding a moratorium on further rail combinations. Many parties explicitly opposed any moratorium; a large group of commenters did not address a moratorium at all; others were clearly influenced by the UP, CSX and NS service failures. Even those shippers who supported a moratorium on new mergers may have been misunderstood about the effect of such a moratorium on the ability of BNSF and CN to have their application heard at this time. For example, in a letter dated March 9, 2000, Arnold Wellman, Corporate Vice President of United Parcel Service, stated that “While we are opposed to any future merger until 2002, we would encourage you to consider providing BNSF a hearing in order to establish a public airing of the facts.” The

split on the virtues of a moratorium and the nature of the arguments raised by those who support a moratorium demonstrate the wisdom of continuing to review proposed mergers on a case-by-case basis.

II. The Proposed Combination Will Not Exacerbate Financial Uncertainty.

Some participants in the Ex Parte No. 582 proceeding expressed concern that further combinations at this time would threaten the financial health of the rail industry and, in turn, its ability to raise capital for infrastructure investments that are necessary to improve service. The record developed in Ex Parte No. 582 made clear that the imposition of a moratorium on consideration of rail merger applications would have worse impacts on the ability of railroads to attract the capital necessary to improve their quality of service, than would prompt resolution of the BNSF/CN application. See Section I above.

A separate claim was made by some that the announcement of the BNSF/CN combination had caused the decrease in the prices of railroad stocks. This groundless charge was answered in detail in the Board's discussions with Messrs. Valentine, Kaplan, and Fred Larsen (of Salomon Smith Barney), representing a cross-section of Wall Street investment banking firms. They discussed, among other things, the increasing gap between the "Old Economy" and the "New Economy," the impact of the earnings announcements of UP, CSX and NS, the longer period over which railroad stocks have declined, the impact of the moratorium discussions and increasing fuel costs, and the impossibility of tying the movement of stock prices to any specific event. Transcript, March 27, 2000, at 252 - 253, 269 - 282.

In addition, Robert Hamada, Dean of the Graduate School of Business at The University of Chicago, cogently pointed out that the ability of railroads to raise debt is a key indicator of their financial health. Transcript, March 9, 2000, at 286 - 287. Other witnesses stated that the public debt of major railroads remains investment quality. Transcript, March 7, 2000, at 266 - 267. Indeed, the proposed combination of BNSF and CN has not adversely affected debt ratings. As of January 27, 2000, Standard & Poor's had affirmed the ratings of BNSF, affirmed the short-term ratings of CN, and placed the long-term ratings of CN on credit watch with "positive" implications.

Because of the importance of this issue, BNSF has attempted to quantify these insights. First, while the Dow Jones Industry Index for Railroads has declined 42.80% in the last twelve months, other "Old Economy" sectors have been similarly hit, with Factory Equipment down by 26.23%, Food down by 35.39%, and Tires and Rubber down by 58.03%.

Second, while the stock prices of individual railroads have declined since the announcement of the BNSF/CN combination, the decline began well before that announcement. Looking at the period from June 8, 1999 to March 9, 2000, one-half of the decline in the stock prices for CSX and NS preceded the announcement of the BNSF/CN combination, while approximately two-thirds of the decline in UP's stock prices preceded the announcement. Since the announcement of the combination, all railroad stocks have continued to decline, although the share prices of CSX and NS, which continue to be afflicted by service problems, have declined most sharply.

The STB should not make policy that would deny fundamental statutory rights to a fair and prompt hearing on a specific transaction based on movements of a highly volatile stock market.

III. Case-by-Case Consideration of Merger Proposals Remains the Best Policy.

Case-by-case consideration of merger proposals, with appropriate consideration of downstream effects, is the best and only fair way to address the specific service concerns raised by shippers and others, without harming the long-term ability of the industry to compete and raise capital. Each rail transaction is different, and each will produce a unique combination of benefits and risks. Each merger will raise potential service issues, including both the ability of the combined railroads to handle their integration and their ability to avoid increasing the service problems of other railroads. However, the merits and potential downstream impacts of any proposed combination can be fully considered, not as an abstract matter, but only in the context of a full record concerning a real transaction. As John M. Cutler, Jr., appearing on behalf of PPL Electric Utilities Corporation and PPL Montana LLC, stated:

“The main concern PPL has is with the status quo. And a moratorium that simply preserves what we have today until the rest of the railroads are ready to merge down into two is not a particularly helpful response to the problems we face. It could be more productive to have the BN-CN merger go forward and result in changes that not only improve the situation for those two railroads, but that influence the way all future mergers are handled, as well.” Transcript, March 9, 2000, at 90 - 91.

It is clear that many commenters want a respite from any further changes in the rail industry, whether those changes are good or bad. However, no sector of the economy is immune from change and competitive pressures. The trucking industry will not cease

competing for loads if the railroad industry takes a “breather,” and industries will continue to make irreversible siting and transportation decisions, based on the availability of single-line hauls for their inputs and their products.

Therefore, the Board’s best course of action is to make the most fully informed decisions possible. Detailed analysis of a specific proposal, fully fleshed out and tested through the Board’s adjudicatory process, is the best manner in which to weigh the benefits and risks of any merger proposal. In an application presented for such detailed review by the Board, BNSF and CN will demonstrate:

- That their combination will produce significant benefits for the public. Shippers will receive the benefits of new single-line hauls for their products to their markets. The combined BNSF/CN will produce significant cost savings, expand the markets available to many of its customers, and result in more efficient operations. BNSF and CN are prepared to offer their shippers individualized service guarantees, to adopt specific dispute resolution mechanisms to handle service complaints, and to develop and file a Service Integration Plan. Interested parties and the Board will have the opportunity to challenge and test the claims presented by BNSF and CN;
- That, building on their smooth implementation of two recent major mergers, their operating plan is fully developed and fully capable of smooth implementation. They will show, in detail, why their combination does not involve the same risks and problems that plagued the UP/SP merger and the CSX and NS acquisition of Conrail’s assets. They will not be trying to combine incompatible information technology systems; they will not be attempting to divide the assets of an integrated railway system; they will not incur debt to purchase stock or assets, thereby drawing on capital better used on system improvements. They will maintain their separate operating units, without attempting a sudden and ill-conceived integration of separate systems, and both railroads are in excellent financial condition. These claims can be tested by interested parties and reviewed by the Board in the actual control proceeding; and
- That their transaction creates little or no risk that the operating problems of other railroads will be exacerbated by their combination. Their operating plan and the promised Service Integration Plan will address these issues. The improved ability of a combined BNSF/CN to compete also should spur other railroads to solve their service problems.

IV. The Adoption of a Moratorium on Consideration of Rail Merger Applications Would Violate the Letter and Spirit of the Law.

The adoption of a moratorium on submission of merger applications, as urged by Edison in its petition and others in the Ex Parte No. 582 hearings, would violate the letter and the spirit of the National Rail Transportation Policy, 49 U.S.C. § 10101, which clearly states that it is the policy of the United States Government “to require fair and expeditious regulatory decisions when regulation is required” and “to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.”

The Board's enabling statute, unlike that of most other regulatory agencies, specifically requires the Board to issue its final decision within fifteen months of the acceptance by the Board of a complete application by two Class I carriers seeking to merge or consolidate. 49 U.S.C. § 11325(b)(3). Moreover, Sections 11324 and 11325 of the ICCTA, 49 U.S.C. §§ 11324-11325, as well as the Board's own regulations (e.g., 49 C.F.R. § 1180.4(c)(7)(i)), make it clear that the Board is required to accept complete consolidation, merger or control applications, to observe specified procedures in handling those applications, and to conform to specified deadlines in rendering decisions about

them.³ The Board simply does not have the authority to treat these mandatory requirements as discretionary.

Furthermore, it is the policy of Congress not just to encourage prompt decision, but also to “encourage mergers, consolidations, and joint use of facilities that tend to rationalize and improve the overall quality and strength of the Nation’s rail system.” *St. Louis Southwestern Railway-Purchase (Portion)-William M. Gibbons, Trustee of the Property of Chicago, Rock Island and Pacific Railroad*, 363 I.C.C. 323, 340 (1980); accord *CSX/NS/CR Decision No. 89*, at 185 (STB, served July 23, 1998)(Vice-Chairman Owen, commenting: “Since 1920, it has been the public policy of this nation to encourage railroad mergers that are in the public interest.”) Any form of moratorium, direct or indirect, would violate this policy.

Congress has spoken directly to the question of the timing of the STB’s consideration of control cases and the STB has previously interpreted those statutory deadlines as mandatory. The STB cannot now interpret the statute to permit it to eviscerate those deadlines by the device of declaring a “moratorium” on accepting new applications for control cases. Any such interpretation will enjoy no deference from the

³See *Hewitt v. Helms*, 459 U.S. 460, 471 (1983)(stating that “shall” is “language of an unmistakably mandatory character”); *N.R.D.C. v. Reilly*, 983 F.2d 259, 267 (D.C. Cir. 1993); *Her Majesty the Queen v. E.P.A.*, 912 F.2d 1525, 1533 (D.C. Cir. 1990). The Board has also recognized the mandatory nature of these deadlines, noting that “our interpretation of the 15-month schedule set out in section 11325(b) is that it provides an outside limit on how long the Board may take to resolve a major merger proceeding.” *Union Pacific Corp. et al. - Control and Merger - Southern Pacific Rail Corp., et al.*, Finance Docket No. 32760, Decision No. 10, at 4 (served Jan. 26, 1996)(emphasis added).

courts. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).

Moreover, since the agency's regulations require the STB to accept a complete application within thirty days of its filing (49 C.F.R. § 1180.4(c)(7)(i)), and the agency has honored those regulations for many years, a "moratorium" that refused to allow presumptively complete applications to be filed would effectively repeal that regulation and depart from years of precedent without notice and an opportunity to comment on the agency's tentative conclusions, in violation of well-established principles of administrative law. See *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999).

A moratorium on the filing of merger applications is nothing but an attempt to bar the door to the agency. For this reason, a refusal by the Board to act on such applications would violate the letter of the STB's statute and the clear congressional intent to expedite significantly the Board's decisions on the merits of railroad mergers and combinations, and to encourage railroad combinations. In addition, it would be a violation of fundamental fairness, due process and the right to a hearing.⁴

V. A BNSF/CN Combination Will Not Produce the Dire Results Predicted by its Railroad Opponents.

It is extremely unfortunate that, in pursuit of their parochial interests, UP, CSX, NS and CP made highly public and aggressive statements designed to inflame shippers and unsettle the financial community. It was hardly "statesmanlike" to threaten their own

⁴Of course, if the Board did have authority to impose a moratorium, it still would have to proceed through notice-and-comment rulemaking, as Edison acknowledges.

shippers with further service disruptions or to use the regulatory process to seek protection from competition.

It is clear that UP, CSX and NS are seeking protection from the fact that BNSF and CN, having smoothly executed their prior mergers, are well-positioned to offer shippers greater efficiencies and market opportunities and to place increased competitive pressure on other railroads. BNSF and CN's solid financial footing will enable them to maintain and enhance the infrastructure needed for improved service to shippers. UP, CSX and NS are deeply concerned that BNSF and CN can take steps to improve efficiencies and service, while they are still struggling to restore service. This has been recognized by those without a stake in this debate:

- The editor-in-chief of a leading trade publication observed shortly after the BNSF/CN combination was announced that "The CN-BNSF merger, viewed objectively, is much more deserving of Surface Transportation Board approval than the Conrail carve-up or the Union Pacific-Southern Pacific merger. And yet CN and BNSF will find it much more difficult to win approval. That is partly because of the mess their competition made of those transactions and partly because of their competitors' hidden anti-competitive motives." Clayton Boyce, *Most Curious*, Traffic World, Jan. 3, 2000, at 5; see also Clayton Boyce, *Fine Line*, Traffic World, Mar. 13, 2000, at 5 ("Not a lot has changed since the merger was proposed several months ago. The [above-quoted] statement that ran in this space at the time of the merger proposal still holds true.").
- "Executives of rival rails are frightened at the prospect of quick approval of the BNSF-CN proposal at a time when they are not in a position to develop a strategic response of their own." Lawrence H. Kaufman, *Delay is Goal of Anti-merger Campaign*, Journal of Commerce, Jan. 12, 2000, at 1, 19.
- "Why is the timing so bad? It's bad because the opponents aren't in a position to play in the merger game themselves.* * *The opponents do not, however, explain that their weak balance sheets result from their own actions. If they did, they might have to admit that they are asking to be 'saved' from themselves." Lawrence H. Kaufman, Unable to Play, They're Trying to Stall Game, Journal of Commerce, Feb. 9, 2000, at 6.

●"I'm starting to hear shippers say, "if the competition is so against this merger, maybe there is something in it for us", says Edward Emmett, president of the National Industrial Transportation League, a shippers' group." Christopher Palmeri, Railroading the Rivals, Forbes, March 20, 2000, at 140.

However, it is time to lower the rhetoric and concentrate on the facts -- there is no basis to assume or conclude that the proposed BNSF/CN combination will produce the dire results predicted by UP, CSX, NS and CP.

●UP, CSX and NS request a moratorium so that they can resolve the service problems remaining from their transactions. UP, CSX and NS seem to suggest that their service problems will continue to exist through and beyond mid-2001, the proposed effective date for the BNSF/CN combination; yet, at the same time, they testified that they are on the road to improvement. The relief they seek would insulate them from new competition for five years after implementation of the UP/SP merger and two years after the Conrail carve-up by CSX and NS. That period, in and of itself, should provide the railroads with a sufficient "moratorium."

●A combined BNSF/CN fully intends to capture business from other carriers and to recapture business from trucks. This competition is a public benefit, not a detriment. UP, CSX and NS should not receive any protection from competition from a combined BNSF/CN.

●A combined BNSF/CN would not increase the service problems of other carriers. The BNSF/CN combination would not involve (a) the physical division of an existing carrier's assets, (b) the acquisition of a troubled carrier, (c) the incurrence of enormous debt, or (d) the hurried combination of two separate railroads into a single operating unit. BNSF and CN, each of which has successfully implemented a prior merger, have designed their primarily end-to-end combination to avoid these problems, and they are backing their plan with a Service Integration Plan and service guarantees to their shippers. In any event, this is an issue best addressed in the context of a control case, not through the blunt instrument of a moratorium or "breather."

●Nothing in the BNSF/CN combination will prevent the combined railroad from working with other railroads to improve interchange service and shared facilities and undertaking other mutually beneficial cooperative efforts. The combined BNSF/CN would continue to have strong incentives to improve all rail service.

●Nothing in the BNSF/CN combination should force the other Class I railroads into unwise and premature mergers. Prudent managers should not pursue new mergers

before their existing service problems are resolved, and the Board clearly should not find any such merger to be in the public interest.

It is unfortunate that, after a period of service disruptions, these same railroads would do so much to inflame and raise doubts and concerns in the minds of shippers and the financial community. Nonetheless, the issues they raised have no merit.

CONCLUSION

In the petition submitted by Edison and parallel requests made during the course of the Ex Parte No. 582 hearings, the Board has been asked to choose between two starkly contrasting paths.

On the one hand, various commenters and, most vociferously, competing railroads suggest that the Board adopt a moratorium, ranging from three to five to ten years, on any future railroad combinations. This moratorium would prevent Board consideration of combinations that can be shown to generate public benefits, would constrain competition and innovation, and would tell capital markets that the ability of railroad managements to respond to new opportunities and challenges would be severely circumscribed.

On the other hand, many shippers, the Secretary of Transportation, eminent economists, financial experts and local governments request that the Board proceed to a decision on the merits of the BNSF/CN application. A decision on the merits would be consistent with the Board's statutory obligations, allow decision on a full record, and still enable the Board to consider the legitimate issues raised by those parties seeking a moratorium.

Under both scenarios, the Board would, in reality, render a decision on the proposed BNSF/CN combination. As noted during the closing comments of the Board members, a decision not to decide is, in fact, a decision. Transcript, March 10, 2000, at 225. It is a decision to deny the proposal without a hearing and without the facts. BNSF asks for its statutory right to present, along with CN, its proposed combination for a decision on the merits by the Board.

BNSF and CN clearly recognize that they will have the burden of demonstrating that their combination:

- (i) will produce public benefits,
- (ii) will not have adverse impacts on competition,
- (iii) can be implemented without adverse consequences on the quality of the service they provide their shippers and without causing operational problems for other railroads, and
- (iv) will not strain their financial capabilities.

BNSF and CN are confident that they will demonstrate that their proposed combination is in the public interest.

Our transaction, indeed, gives the STB a vehicle to address shippers' concerns about the current environment in the context of a specific case. However, the regulatory change sought by Edison and others would deny BNSF and CN the opportunity to make their case to their shippers, their shareholders, the financial community and the Board.

The STB has a proud heritage of addressing specific issues on their merits in a fair and timely manner. Imposition of any form of moratorium direct or indirect, on the filing of cases would be a radical departure from that heritage, unjustified by the BNSF/CN

proposal. The denial of the opportunity to be heard is a denial of fundamental fairness, due process, and the right to a timely hearing. Sound public policy and the law obligate the STB to permit BNSF and CN to file their application.

Therefore, the Board should reject Edison's petition for a rulemaking to establish such a moratorium, as well as all similar requests.

Respectfully submitted,



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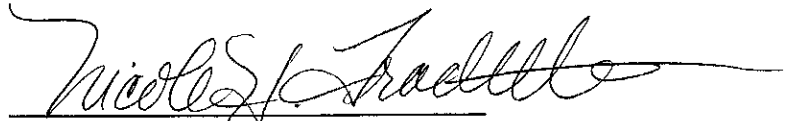
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March 14, 2000

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Reply of The Burlington Northern and Santa Fe Railway Company to Petition of Edison Mission Energy Company and Midwest Generation, LLC has been served this 14th day of March 2000, on Edison Mission Energy Company and Midwest Generation, LLC.



Nicole H. Fradette